IN THE

Supreme Court of the United States

October Term, 1943.

No. 436

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

versus

JAMES V. REUTER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

FRANK S. NORMANN,
Attorney for Respondent.

NORMANN & ROUCHELL, and
CARLOS E. LAZARUS,
1605 Hibernia Bank Building,
New Orleans, La.,
Of Counsel.

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OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court (R. 30-37) are reported in 49 F. Supp. 485. The opinion of the Circuit Court of Appeals (R. 47-52) is reported in 137 F. (2d) 315.

JURISDICTION.

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925.

QUESTIONS PRESENTED.

1. Was the Circuit Court of Appeals warranted in holding that respondent's employees when packing, hauling, and delivering food to vessels for the provisioning of the crew were not within the provisions of the Act?

2. Was the Circuit Court of Appeals warranted in holding that produce purchased out-of-State came to rest when placed on respondent's place of business?

3. Are employees engaged in sorting, selecting, repackaging and otherwise handling produce without regard to the final destination thereof engaged in the production of goods for commerce within the meaning of the Act?

4. Was the Circuit Court of Appeals warranted in holding there was no showing that respondent's employees spent a substantial portion of their time in interstate activities?

STATUTE INVOLVED.

The pertinent provisions of the Fair Labor Standards Act are set forth in the Appendix.

STATEMENT.

This suit was brought by the Administrator of the Wage and Hour Division on January 23rd, 1942, to enjoin the respondent, a Louisiana Corporation, from violating certain provisions of the Fair Labor Standards Act (R. 2-8).

Briefly, the facts as found by the District Court are as follows: Respondent is engaged in purchasing, selling and distributing fresh fruits and vegetables, and it employs from 10 to 15 employees, including office help, warehousemen and truckdrivers. (R. 30.) Approximately 50% of the produce sold by respondent is purchased from out-of-state sources. This produce arrives in refrigerated railroad cars which average from 12 to 20 per month, and are delivered to respondent's private switch track. (R. 30-31.) These cars are used by respondent as temporary night storage for produce that may be on hand at the end of the day (R. 32) thereby availing itself of the refrigeration remaining therein after arrival. All the vegetables arriving from other states are unloaded from the freight cars and brought to respondent's place of business to be uncrated, unpacked and examined before being sold (R. 31). Because of their perishable nature, the District Court found there was a rapid turnover of the produce sold by the respondent (R. 32).

Respondent sells fully 95% of all its produce to wholesalers and retail merchants in the City of New Orleans, only 5% of the total yearly sales being made to out-of-state customers (R. 31). Respondent's warehouse employees sort, select, repackage and handle the produce

received, without distinction as to its ultimate destination, orders being made from stores on hand (R. 31-32). Respondent also sells produce to local ship chandlers who purchase same to provision boats sailing out of the port of New Orleans, but the bulk of this produce is picked up by the ship chandlers themselves in their own trucks at respondent's place of business (R. 32). Occasionally, however, respondent's truck drivers deliver some of this produce to the docks (R. 32). The hours worked by the warehousemen and truck drivers were found to range from 55 to 75 hours per week (R. 33) the truck drivers spending not more than one and one-half (1½) hours a day in unloading produce from the freight cars and hauling it to respondent's place of business (R. 31).

The District Court held (1) that because of the rapidity in turnover of goods received from out-of-state sources, there was a continuity of movement of such goods from out-of-state on to respondent's customers, whether local or distant, and that therefore respondent's employees were engaged in commerce within the meaning of the Act (R. 35); (2) that employees engaged in sorting, picking over, handling and packaging produce in respondent's place of business without regard to the final destination thereof, were producing goods for commerce within the meaning of the Act (R. 34); (3) that the employees who prepared and shipped orders to out-of-state customers and those who prepared and delivered orders to ship chandlers for provisioning of vessels on their voyages were engaged in commerce within the meaning of the Act (R. 34).

The Circuit Court of Appeals reversed and remanded the case on the grounds that (1) the lower court erred

in ruling that the produce had not come to rest at respondent's premises; (2) that employees delivering goods to ship chandlers and to ships for the provisioning of the crew were not engaged in commerce within the meaning of the Act; (3) that in the absence of a showing that a substantial portion of the time of respondent's employees was spent in interstate activities, the fact that 5% of the total sales of defendant are made to out-of-state customers, is insufficient to establish they were within the provisions of the Act; (4) that the lower court erred in holding that the sorting, repackaging and handling of goods constituted production of goods for commerce within the meaning of the Act.

ARGUMENT.

As we understand it, petitioner's position is that since the exclusion clause of Section 3(i) of the Act defining "goods" does not apply to the *production* or the handling of goods prior to their delivery to the ultimate consumer, the Circuit Court erred in holding that the employees of respondent engaged in delivering produce to vessels for the consumption of their crews were not within the provisions of the Act. The fallacy of this argument is that it assumes the very point to be established, namely, that respondent's employees were engaged either in commerce, or in the production of goods for commerce, in the first instance.[1] But the Circuit Court held that when the produce was

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[1] Delivery of goods to an ultimate consumer would be a delivery in commerce only if such delivery is a part of a continuous movement in interstate commerce.

unloaded at respondent's place of business, the interstate character of their movement terminated,[2] so that any subsequent movement thereof was purely intrastate. Moreover, the Circuit Court also held that respondent's employees were not engaged in the production of goods for commerce.[3] Of necessity, then, the decision of the Court below must be predicated on its holding that the produce had come to rest when delivered to the respondent's place of business, from which follows that the respondent's employees who, occasionally delivered the produce to the docks, were not delivering "goods" within the meaning of Section 3 (i) of the Act, since the vessel was not a producer, manufacturer or processor thereof. The decisions in *Hamlet Ice Co. v. Fleming, 127 F. (2d) 165; Chapman v. Home Ice Co., 136 F. (2d) 353* and *Atlantic Co. v. Walling, 131 F. (2d) 518*, on which petitioner strenuously relies, are not apposite to the facts here presented, nor in conflict with the holding of the Circuit Court. Those cases involved the production and delivery of ice for use in the refrigeration of interstate shipments of perishable products and the decisions were predicated on the fact that the production of ice intended for refrigeration of perishables to be transported in interstate commerce was so closely related to commerce as to be a part and parcel thereof.[4] As pointed out by the Circuit Court such is not the case here, and we adopt the reasoning of the Circuit Judge that the supply-

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[2] James V. Reuter v. Walling, 137 F. (2d) 315, 319.

[3] "We disagree with the legal conclusion of Paragraph 4 of the Conclusion of the lower Court that the defendant's employees were engaged in the production of goods for commerce * * *" James V. Reuter v. Walling, supra, at p. 318.

[4] "It is idle, therefore, to deny that the production of ice intended for refrigeration of perishable merchandise in transportation is not a necessary element of transportation * * *" Chapman v. Home Ice Company of Memphis, 136 F. (2d) 353, 355.

ing of food for the consumption of the crew of a vessel, is not so intimately connected to interstate commerce as to be an integral part thereof.

2. Petitioner's second ground in support of the issuance of the writ is based upon the erroneous belief that the District Court found as a matter of fact that there was a continuity of movement in interstate commerce of the produce received by respondent from out-of-state until delivered to respondent's customers, whether local or distant. All the District Court found was a rapidity of turnover due to the perishable nature of the vegetables, from which the District Court erroneously concluded there was a continuity of movement. We challenge the doctrine that because there is a rapidity of turnover of a perishable, there is a continuity of movement in interstate commerce. According to the decisions of this Court in *Walling v. Jacksonville Paper Co., 317 U. S. 564, 63 S. Ct. 332,* and *Higgins v. Carr Bros. Co., 317 U. S. 572, 63 S. Ct. 337,* something more than mere rapidity of turnover is essential to establish continuity of interstate movement.[5] As clearly stated by the Circuit Court the term "coming to rest" must be considered in its relation to the commodity, and it can not be said that because a perishable cannot be kept indefinitely, it may not come to rest. To use the language of the Circuit Court:

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[5] Cf. Walling v. Jacksonville Paper Company, 317 U. S. 564, 63 S. Ct. 332 where it was held that the mere fact that customers of the company formed a fairly stable group; that their orders were recurrent as to kind and amount; and that the company was in a position to order his goods in anticipation of demand, did not necessarily establish a continuity of movement in interstate commerce. See also, Higgins v. Carr Bros. Co., 317 U. S. 572, 63 S. Ct. 337. And Walling v. Siver Bros. Co., 136 F. (2d) 168 (C. C. A. 1st) where the court holds that the mere fact that there is a rapid turnover of perishable goods does not of itself establish a continuity of movement.

> "The rest period of an axe handle could be far greater than the rest period of a tomato, and the perishable nature of the commodity alone would not place the vegetable merchant under the Act when the hardware merchant is not, merely because the axe handle could endure a longer period of repose than a tomato. *Vegetables do not have to 'come to rot' in order to order to 'come to rest.'*" *James V. Reuter v. Walling*, 137 F. (2d) 315, 319. (Italics supplied.)

Furthermore, the District Court affirmatively found that the vegetables are uncrated, examined, sorted, repackaged, sold and delivered upon arrival at respondent's place of business; that 95% of the produce was finally disposed of to the local trade within two to five days after arrival from points outside the state. There was no finding that respondent had prior contracts with its customers. In all instances buyers had to be found willing to buy, and pay for produce of the quality and price offered. As said by the Circuit Court, **"these miscellaneous tasks are time-consuming and are inconsistent with continuity of movement."**[6] There is no difference between the facts as presented by this record and those brought out in the *Higgins Carr Company* case. There, respondent was engaged in the sale of fresh fruits and vegetables buying most of its merchandise out-of-state; the produce was delivered to its warehouse and from there it was distributed to the trade. It made no sales on commission or on order, and there were no shipments direct to the purchaser. These facts, it was held, were insufficient to establish a continuous movement in interstate commerce.

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[6] (R. 51.)

3. The Circuit Court reversed, without discussion, the lower court's conclusion that the employees of defendant who sorted, handled and packaged the produce, **without regard to the final destination thereof,** were producing goods for commerce.[7] Petitioner contends that the court erred in so doing because under Section 3(j) of the Act production includes the "handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." In other words, petitioner would have the Court hold that because respondent's employees "handled" the produce received by respondent at its place of business, after it had come to rest therein, they were necessarily engaged in the "production of goods for commerce". If petitioner's interpretation of the statute is correct, then the mere *handling* of the produce and the mere *transportation* thereof would constitute a production, and every person engaged in handling and transporting goods in interstate commerce would necessarily be engaged in "production". Such we believe, was not the avowed intention of Congress for, it is to be noted that the scope of the Act includes two classes of employees,—those engaged in the production of goods for interstate commerce, and those merely engaged in interstate commerce.[8] When it is con-

[7] (R. 34.)

[8] That a person may well be engaged "in commerce" and not in the "production of goods for commerce" is evident from the decisions in Kirschbaum v. Walling, 316 U. S. 517, 62 S. Ct. 1116, 86 L. Ed. 1638 and Johnson v. Dallas Downtown Development Co., 132 F. (2d) 287 (C. C. A. 5th), and related cases. In the Kirschbaum case, it was held that employees in loft buildings, the tenants of which were engaged in the production of goods for commerce, were likewise so engaged because they were engaged in an activity necessary to such production. In the Johnson case, it was held however, that such employees were not engaged in the production of goods for commerce, because the tenants of the building were merely engaged in interstate commerce.

sidered that the Circuit Court determined the produce received by respondent had come to rest at its place of business, and, as found by the District Court, that 95% of the produce was sold locally, only 5% being sold to customers outside the State,[9] the reason for the Court's failure to discuss the question at length is evident. Had respondent sold its entire produce locally, it could not be successfully contended that the preparation of orders to be delivered would constitute a "production of goods for commerce" simply because they were "handled" by respondent's employees. Does the mere fact that 5% of the sales were made to out-of-state customers, change the character of the "handling" so as to convert it into a "production"? The obvious answer to petitioner's argument is that it is not every "handling" which will constitute a "production" within the meaning of the Act, but only such handling *as is necessary to the production of goods for commerce.*[10]

Petitioner relies upon the case of *Fleming v. Kenton Loose Leaf Tobacco Warehouse Co., 41 F. Supp. 225*, decided by the District Court for the Eastern District of Kentucky. While the Court did say that a warehouseman whose sole function was to lend its agencies to growers and sellers of tobacco for the sale of the tobacco in interstate commerce was a "producer" as defined by the Act, because it was a *"handler of a product moving in interstate commerce"* it is submitted that the decision rested on the fact that defendant and its employees were engaged "in commerce" and not in the production of goods for in-

[9] Findings of Fact #4, (R. 31).

[10] This is more evident from the very limitation contained in the definition which limits the "handling or transportation" to cases where it is necessary to the production of goods.

terstate commerce. At any rate, the case is distinguishable from the case at bar in that respondent's employees were not HANDLING THE PRODUCE IN INTERSTATE COMMERCE, nor was the handling or transportation thereof a necessary step in aid of or necessary to the manufacture or fabrication of any products.[11] Respondent in this case is not engaged in the manufacture or production of any articles; how then can it be said that its employees are so engaged?

4. The District Court found that respondent's employees, namely, the warehousemen and truck drivers, worked from 55 to 75 hours a week,[12] and that the truck drivers spent not more than one and one-half (1½) hours a day "unloading freight cars and hauling the produce to respondent's place of business,"[13] The rest of their time was obviously spent in the intrastate activities of delivering orders to the local trade. As to the packers and warehousemen, however, no showing has been made regarding the time spent in intrastate and interstate activities, and obviously, they were engaged in both. In the absence of any definite showing of the actual time each employee engaged in interstate activities, it was impossible for the Circuit Court to ascertain, with any degree of accuracy, what portion of their time was actually so spent, and for that reason, the case was remanded for further evidence. To say that because 5% of the respondent's total sales were to out-of-state customers, its employees spent a sub-

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[11] See Calaf v. Gonzales, 127 F. (2d) 934 (C. C. A. 1st) wherein it was held that employees engaged in the transportation and handling of sugar cane from the farms to the mill were engaged in the production of goods for commerce, because it was incidental to and necessary to the manufacture of sugar.

[12] Finding of Fact #8 (R. 33).

[13] Finding of Fact #3 (R. 31).

stantial portion of their time in interstate commerce would be begging the question. Of course, the Circuit Court's decision must be interpreted in the light of all facts presented to it, and it cannot be given the broad construction petitioner attempts to impart upon it. Naturally, if as contended by petitioner, an employer is doing 100% interstate business, all of its employees would be engaged in interstate activities, whether they worked one hour or one hundred hours. Conversely, when only 5% of the employer's business is "in commerce", the greater portion of the employees' time must necessarily be spent in local activities, in the absence, of course, of evidence showing that one particular individual attended to all of this phase of the business. In such cases, the necessity of showing the proportion of time spent in interstate and intrastate activities is evident, the question being one of law for the court to determine. Where, as in this case, there is an absolute failure to prove how much of the work done is interstate and how much intrastate, the court is powerless to determine the question, and the case must be remanded for further evidence. *Super Cold South West Co. v. McBride, 124 F. (2d) 90 (C. C. A. 5th); White Motor Co. v. Littleton, 124 F. (2d) 92 (C. C. A. 5th); Jax Beer Co. v. Redfern, 124 F. (2d) 287 (C. C. A. 5th).*

CONCLUSION.

The basis for the decision of the Circuit Court of Appeals in all of the questions presented rests primarily upon the holding that the produce came to rest when delivered

to the respondent's place of business. The delivery of this produce was made by the truck drivers, who are admittedly excluded from the overtime provisions of the Act. There remains only the other employees of respondent, as to whom petitioner would have the court hold they were engaged in interstate activities simply because they prepared for shipment 10 to 12 small packages a day to out-of-state customers, without showing that they actually spent a substantial portion of their time in this activity. Petitioner's contention that the District Court found there was a continuity of movement can not be seriously urged in the absence of a specific finding of fact to that effect, and such a finding has not been made. Its conclusion in this respect is, as has been shown, unsound.

We respectfully submit, therefore, that the writ of certiorari be denied.

FRANK S. NORMANN,
Attorney for Respondent.

NORMANN & ROUCHELL, and
CARLOS E. LAZARUS,
1605 Hibernia Bank Building,
New Orleans, La.,
Of Counsel.

APPENDIX.

Fair Labor Standards Act, 52 Stat. 1060 (29 U. S. C. A., Sec. 201, et seq.):

> Sec. 3 (i). "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

> Sec. 3 (j). "Produced" means produced, manufacturned, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.